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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 1297

HARRY T. BOWERS,
Petitioner,

v.

KAISER STEEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

To the major question stated by petitioner should be added a subsidiary issue: Should this court grant certiorari to review a contention (that the "vessel" of which petitioner now claims to be a member of the crew was the drilling platform) advanced for the first time on petition for certiorari, and which was never made in either of the courts below, the Alaska Superior Court or Alaska Supreme Court?

STATEMENT OF THE CASE

The material and uncontroverted facts upon which the two courts below held there was no fact issue to submit

to a jury as to petitioner's status as a seaman, may be conveniently marshalled as follows:

1. Petitioner is an ironworker, not a seaman, by trade; he had been an ironworker for 20 years, had never been to sea as a seaman, had never held seaman's papers at any time, and was hired by respondent as an ironworker and was working as ironworker foreman when injured (Deposition of Petitioner, pp. 6-7, 25).

2. Petitioner did not eat, sleep, or travel on the barge on which he was injured, or on any tug or barge. At one time he lived in a camp on the fixed platform which was being constructed, but at the time of his injury he was living ashore in a rented house, and travelled back and forth between the drilling platform and his house by helicopter (Deposition of Petitioner, p. 8).

3. Petitioner was injured on a Foss Company barge, towed and controlled by a Foss tug whose crew members, and not petitioner, navigated the barge (Deposition, pp. 8-10). Respondent did not own or operate the barge (Foss Barge No. 185), which was owned by the Foss Launch & Tug Company whose tug towed the barge to and from the drilling platform carrying construction materials for the platform, pursuant to a towage contract between Foss and respondent. Respondent neither hired nor paid the crew members of the tug, who at all times were employees of Foss (Chisholm Affidavit, Appendix B to the Petition).

4. Petitioner was injured aboard the Foss barge while assisting in unloading of construction material from the barge to the platform. He was supervising other ironworkers engaged in such unloading activity, and per-

sonally was acting as signalman for the crane operator on the platform (Deposition pp. 13-14, 17).

5. During the entire period of his employment by respondent as ironworker foreman, petitioner's sole function aboard any barge brought to the platform was to load and unload cargo between the barge and drilling platform (Deposition, pp. 16-17).

6. Petitioner's relationship to any of the barges brought to the platform was sporadic, and he knows not whether he ever did work aboard Foss Barge No. 185 prior to his injury. He testified (Deposition pp. 15-16):

"Q. Can you tell us how many times you had been on board this particular barge before?

"A. I definitely don't.

"Q. Can you estimate it?

"A. I don't know whether I have ever been on that one before or not. I might have. They brought stuff aboard, brought the barges along side and we just went down and took the material we needed off. I never paid much attention to which one came along side, just whatever material we needed at the time."

7. In performing his work petitioner took no orders from the officers or crew of the Foss tug (except to stop work when the seas got too rough to hold the barge in position), but rather from respondent's general foreman on the platform construction job (Deposition, pp. 7, 19).

8. The Middle Ground Shoals drilling platform had been permanently secured to the floor of Cook Inlet on August 16, 1964, by non-watertight legs which supported the platform and were permanently secured to the ocean floor. (This occurred prior to the time petitioner went

to work for respondent, Deposition p. 7). After fabrication of the drilling platform in California the legs were made temporarily watertight in order to furnish flotation to the platform (which is not and never has been capable of floating) to enable it to be towed to Alaska; but after installation of the legs and platform in Cook Inlet the platform was and is a permanent structure, and one that was not designed or intended for use in the transportation of persons and property, has not been used for that purpose and is not capable of being used for that purpose (Chisholm Affidavit, Appendix B to Petition).

ARGUMENT

A. The Middle Ground Shoals Drilling Platform Was Not a Vessel

1. *Petitioner's claim that the platform was a vessel and he a member of its crew was not properly raised below.*

Petitioner apparently contends that the drilling platform was a "special purpose" vessel or structure and because he concededly had a permanent relationship to this structure he, therefore, presented an evidentiary basis for a jury finding that he was a Jones Act seaman. Thus, he claims (Petition, p. 6) the Alaska Supreme Court unduly limited the scope of its review to whether petitioner could be found to be a member of the crew of the Foss barge; and he asserts that the drilling platform is not distinguishable from the drilling barge involved in *Offshore Co. v. Robison*, 266 F.2d 769 (5 Cir., 1959) and the Texas tower in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 2 L.Ed.2d 737 (1958).

Not until now has petitioner advanced this theory, that the drilling platform could be found to be a vessel and he

a member of its "crew"; and the Alaska Supreme Court was correct in stating in footnote 14 of its opinion (Petition, Appendix A, p. v), that "Appellant does not contend that the drilling platform was a vessel." In his Complaint (R. 1) petitioner alleged that: "Plaintiff was a seaman at the time of his injury because he was on said barge which was held against the tower by two tugboats * * *." Although he now contends (Petition, p. 6 fn. 1) that it is not fairly inferable from this allegation that the barge was the only vessel on which he claimed to be a crew member, in the proceedings in the courts below he consistently took the position that he was a crew member of the barges on which he worked cargo and hence, of the Foss barge on which he was injured.

Thus: In his brief in opposition to the motion for summary judgment before the Superior Court, petitioner stated:

> "In effect, Kaiser Steel Company hired the plaintiff to unload each of the barges brought to the platform. *He was a crew member of each of the barges* * * *." (Emphasis added) (R. 58)

On page 6 of his Appellant's Brief on Appeal to the Alaska Supreme Court, petitioner likewise asserted that, "He was a crew member of each of the barges, hired specifically to do the job of unloading whichever barge had the correct steel components." In his Reply Brief before the Alaska Supreme Court, petitioner devoted two sections to the claims that he was permanently assigned to work on all the barges brought to the job site and that his longshoreman's work in handling cargo contributed to the mission of the barges. Not until this petition has petitioner asserted he was a member of the crew of the drilling plat-

form. Small wonder the Alaska Supreme Court concluded that petitioner "does not contend that the drilling platform was a vessel."

Petitioner's belated contention that the Middle Ground Shoals drilling platform was a special purpose vessel and he a member of its crew and hence a Jones Act seaman, was not properly raised, litigated or passed upon below. This court should not, and does not, grant certiorari to review such cases, *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328-9, 89 L.Ed. 273, 274 (1944); *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed. 999, 1000. Further, the decision of the Alaska Supreme Court that petitioner did not there assert that the drilling platform was a vessel is binding upon this court, *Hartfort Life Ins. Co. v. Johnson*, 249 U.S. 490, 492-3, 63 L.Ed. 722, 724 (1919).

2. *As a matter of law the drilling platform was not a vessel.*

If consideration is given to petitioner's newly-conceived claim that the platform is a vessel, it is clear as a matter of law that it is not. And until he filed this petition, petitioner agreed that it was not; in his Appellant's Brief before the Alaska Supreme Court, p. 8, discussing *Gianfala v. Texas Co.*, 350 U.S. 879, 100 L.Ed. 775 (1955), petitioner stated: "The drilling platform was not a vessel by any stretch of the imagination." And yet he now contends that the Middle Ground Shoals platform was a vessel!

So far as we know, all courts considering the issue have uniformly held as a matter of law that non-navigable, non-floating, permanently-fixed structures such as this drilling platform are not vessels and construction work-

ers engaged in constructing them are not seamen by virtue of their employment on such structures. The latest decision is *Johnson v. Noble Drilling Co.*, 264 F. Supp. 104, 106 (D.Ct. La., 1966), where the court said:

> "The platform ST-11 was permanently affixed to the ocean floor. It was immovable and incapable of being floated or otherwise used or moved upon the surface of the Gulf. Such platforms cannot in any sense of the word be considered as vessels in navigation within the meaning of Jones Act or the general maritime law. *Ross v. Delta Drilling Co.*, E.D. La. 1962, 213 F. Supp. 270, *Sirmons v. Baxter Drilling Inc.*, W.D. La. 1965, 239 F. Supp. 348; *Dixon v. Oosting*, E.D. Va. 1965, 238 F. Supp. 25; *Hill v. Diamond*, E.D. Va. 1962, 203 F. Supp. 877, aff'd 4 Cir., 311 F.2d 789."

In that case the court held a member of the oil drilling crew injured aboard the platform not to be a member of the crew of a tender—a special purpose vessel—used to support the drilling activities on the platform.

Texas Co. v. Savoie, 240 F.2d 674 (5 Cir., 1957), held a permanently fixed well platform—similar to the one at bar—was not a vessel as a matter of law. *Hill v. Diamond*, 311 F.2d 789 (4 Cir., 1962), held a floating tube or section of a vehicular tunnel was not a vessel and workmen on such floating tunnel section were not seamen as a matter of law. *Dixon v. Oosting*, 238 F. Supp. 25 (D. Ct. Va., 1965), held a capsetting rig resting on pilings was not a vessel and a piledriver operator working on the rig not a seaman—likewise as a matter of law. *Petition of United States*, 203 F. Supp. 215 (D. Ct. N.Y., 1962), held that a Texas Tower permanently affixed to the bottom of the sea on legs, similarly to the drilling platform involved in the case at bar, was not a vessel for

the purposes of application of the Limitation of Liability Act, and this despite the fact that the platform itself was capable of floating and had been floated to the installation site. The court stated at 203 F. Supp. 219:

> "The fact that the Tower was floated to its position does not make it a 'vessel' * * *. The fixed nature of this Tower is incongruous to the concept of mobility. Merely because a component of the Tower had or has the potential ability to float does not constitute the Tower a 'vessel.'"

(Compare this with Petitioner's Argument on page 10 of the Petition, fn. 2.)

Nor are the foregoing authorities contrary to *Offshore v. Robison*, 266 F.2d 769 (5 Cir., 1959), on which petitioner places chief reliance (Petition, p. 10). On page 9 of the petition, petitioner incorrectly describes the "vessel" in *Robison* as "a non-motive drilling platform, similar to the platform in the instant case," and on page 10 inconsistently asserts that the fact that the *Robison* "platform" was moved from time to time to different locations is not a distinction of controlling significance. But this distinction is vital and was so regarded by the Circuit Court in *Robison*. There, the worker was injured on a submersible drilling barge or mobile drilling platform, designated "Offshore No. 55," which was moved about from well to well as occasion demanded. The Circuit Court in *Robison* distinguished that case from *Texas* [illegible] 240 F.2d 674, Cert. denied, 355 U.S. 840, [illegible] (involving a permanent oilwell platform) [illegible] by stating at 266 F.2d 779:

> "The [illegible] case is not this case. There was no showing that Savoie performed any duties on the [illegible] he was a passenger on a water-taxi. *His duties*

> *related entirely to work on permanently fixed well platforms.* Robison was attached permanently to Offshore No. 55. *Offshore No. 55 is not a man-made island.* Like the submersible barge in Gianfala, Offshore No. 55 was a special purpose vessel, a floating drilling platform. * * * Some of Robison's duties had a 'significant navigational function,' like Senko's in that they related to the seaworthiness, maintenance (welfare) of Offshore No. 55. Some of his duties—to which a jury might have attached importance—though minor are traditionally the duties of seamen *in that they related to the movement of the vessel as a means of transport on water." (Emphasis* added)

As a matter of law, petitioner could not be a Jones Act seaman because he worked on the permanently-fixed Middle Ground Shoal drilling platform. If he could be found a seaman at all it is solely because of his longshoreman's work aboard the Foss barge; and unless *Swanson v. Marra Bros.*, 328 U.S. 1, 90 L.Ed. 1045 (1946) is to be now overruled, an employee whose sole connection with a vessel not owned or operated by his employer is to load or unload cargo from it does not present an evidentiary basis to carry his claim to a jury, that he is a seaman entitled to sue his employer under the Jones Act rather than be restricted to his rights under the Longshoremen's Act.

B. The Alaska Supreme Court Did Not Decide This Case Contrary to the Applicable Decisions of This Court Which Do Not Make This a Jury Case

As he did in the court below, petitioner relies almost exclusively on the four cases decided by this court between 1955 and 1958, discussed *infra*, which concededly went a long way in liberalizing the concept of what constitutes a sufficient evidentiary basis to take to a jury a claim that a worker injured on navigable waters is a

Jones Act seaman or member of the crew of a vessel. However, all of these cases differ from the case at bar in two vital particulars, each of which is fatal to petitioner's claim:

(1) In every case there was evidence that the employee performed, had performed or was expected to perform some significant navigational function pertaining to the vessel; and

(2) In every case the employer, so far as may be inferred, owned or operated the vessel of whose crew plaintiff claimed to be a member. In no case has this Court held that a jury question is presented where the employee's sole function aboard the vessel was to load or unload cargo—the traditional job of the longshoreman.

It was the unique factual situation in each of the cases decided by this Court which prompted its decision to hold the issue of the workman's status to be a jury question. In *Gianfala v. Texas Co.*, 350 U.S. 879, 100 L.Ed. 775 (1955), the operative facts appear from the Circuit Court's opinion in 222 F.2d 382, 384 (fn. 2). The workman was killed while working on a submersible drilling barge called the "Shea" which was submerged at the time of the accident. It was without doubt a "special purpose vessel"; it was undeniably a vessel since it was periodically moved from one location to another. When this was done the decedent's duty was to float the barge by pumping it out so as to permit it to be moved, and then to sink it again when it reached its new location. This had occurred at least 10 to 12 times while the decedent had been employed aboard the barge and he accordingly had a "significant navigational function" to perform

aboard this vessel, and his regular work contributed to the mission of this special purpose vessel. Unlike the workman in *Gianfala,* petitioner had no more or less permanent connection with the Foss barge and performed *no* navigational function whatever aboard that barge, significant or otherwise.

Senko v. LaCrosse Dredging Corporation, 352 U.S. 370, 1 L.Ed.2d 404 (1957), undoubtedly contains the most illuminating discussion of this Court's views of what constitutes an evidentiary basis to submit to a jury the issue of an employee's claim to the status of a seaman. In *Senko,* the plaintiff was a maintenance man about a dredge—concededly a vessel—whose work included the carrying and storing of supplies and general maintenance of the dredge, and he was injured by the explosion of a coal stove while placing signal lanterns from the dredge in a shed ashore. The Illinois Appellate Court characterized the plaintiff as an employee whose principal duty was to load supplies on a vessel at anchor and perform incidental tasks of a common labor character; in reversing, this court did not hold that the loading of cargo on or off a vessel constituted the workman a member of the crew—which is the issue in this case—but rather found a sufficient evidentiary basis in the record that the plaintiff had a *significant navigational function* to perform aboard the dredge so as to require submission of the issue of status to a jury. The precise basis of this Court's action *in Senko* and allied cases is illuminated by the following language from the opinion (1 L.Ed.2d 407):

> "Petitioner's witnesses testified that he was known as a 'deckhand' among rivermen. They said that he

was hired to clean and take care of the deck, splice rope, stow supplies, and, in general, to keep the dredge 'in shape.' This testimony indicated that *substantially all of petitioner's duties were performed on or for the dredge. A normal inference is that petitioner was responsible for its seaworthiness.* If the dredge leaked, for example, the jury could suppose that his job would be to repair the leak. Furthermore, a witness testified that *a usual duty of one holding petitioner's job was to take soundings and clean navigational lights when the dredge was in transit.* 7 Ill. App.2d, at 310, 129 N.E.2d, at 455, 456. Here again, the jury could reasonably have believed that petitioner would have these responsibilities in the event that this dredge were moved. Whether petitioner would be a member of the dredge's crew while taking soundings during a trip is certainly a jury question. If he were a member during travel, he would not necessarily lack that status during anchorage."

This court concluded at 1 L.Ed.2d 408:

"Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew." (Emphasis supplied)

The facts quoted above distinguish *Senko* from the case at bar. Petitioner was not "employed almost solely" on this Foss barge. He had no duty to maintain it. He did not have and was not expected to have any "significant navigational function" to perform aboard the barge.

The majority *per curiam* opinion in *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 2 L.Ed.2d 737 (1958), upon which petitioner places principal reliance, does not

disclose either the "evidentiary basis" of the jury question found to exist in that case, or which vessel that court had in mind, in concluding that Grimes could be found by a jury to be a seaman. It does appear from the dissenting opinion that immediately prior to his injury the Texas Tower had been towed to sea and Grimes lived on the Tower and kept it in condition by operating the machinery and pumps to expedite installation at the permanent site, as well as by performing certain functions to keep it in safe tow, during the voyage. He was injured while returning to the Tower some six days after permanent installation, from an unmanned barge where he had worked to prepare for transfer of construction materials to the Tower.

Grimes, too, is unlike the case at bar. When Grimes' Tower was towed to sea it was a floating, mobile vessel. Grimes was a crew member during the navigation of the Tower because he was aboard performing a significant navigational function—keeping the Tower seaworthy, operating the pumps and keeping this special purpose vessel in safe tow. That this is what this court had in mind is reasonably inferable from the citation of the *Senko* case, in support of the *per curiam* holding in *Grimes*. The *Grimes* case is further distinguishable in that there is no indication that the transportation barge on which Grimes had been working just before his injury was not owned by the employer. This is not true in the case at bar; how can respondent be said to be the employer of crew members working on the Foss barge when respondent neither owned nor operated the Foss barge or the Foss tug which navigated and towed it? It is a logical anomaly to impose the obligations of a shipowner upon an employer who

neither owns, charters nor operates the vessel of which the employee claims to be a member of the crew and seaman. Cf. *Ross v. Delta Drilling Company*, 213 F. Supp. 270 (D. Ct. La., 1962), where the drilling crew employee was injured on a support vessel owned and operated by a third party. In concluding that Ross was no seaman, the District Court gave considerable weight to the fact that the defendant-employer did not own or operate the vessel of which its employee claimed to be a crew member.

Butler v. Whiteman, 356 U.S. 271, 2 L.Ed.2d 754 (1958) involved the drowning of a day laborer who did odd jobs about his employer's wharf and had been cleaning the boiler of a tug preparatory to the tug returning to service just prior to his drowning. This court merely held in a *per curiam* opinion that a jury question was presented as to whether the tug was in navigation and whether or not the employee was a member of a tug's crew. Unlike respondent, Butler's employer owned and operated both the tug and barge there involved; and unlike petitioner, Butler's work was to ready the tug for navigation.

Undeniably the foregoing cases greatly liberalized traditional concepts of who may be a "seaman," but they nevertheless stopped far short of permitting a jury to infer that unloading cargo ever transforms a maritime worker such as petitioner into a Jones Act seaman. The referenced decisions of this Court have not been construed by the lower Federal courts as requiring every claim to a seaman's status to be submitted to a jury, nor have they viewed these decisions as obliterating the traditional right and function of the courts to hold, in a proper case, that

there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman and member of a crew of a vessel under the Jones Act. See, e.g., *Offshore Company v. Robison*, 266 F.2d 769 at 778; *Kyles v. James W. Elwell & Co.*, 296 F.2d 703, 704 (7 Cir. 1961), Cert. denied, 369 U.S. 852, 8 L.Ed.2d 10 (1962); *Rotolo v. Halliburton Co.*, 317 F.2d 9, 12 (5 Cir. 1963), Cert. denied, 375 U.S. 852, 11 L.Ed.2d 9. Though we are cautioned that this Court's denial of certiorari should nto be taken to mean that it approves the decision involved, nevertheless it can fairly be stated that this court has had ample opportunity to correct the understanding of the lower courts if this court meant to hold in the *Gianfala* to *Butler* cases that every claim by a maritime worker to a seaman's status perforce presents a fact question. It has not done so because, we suggest, this Court meant to announce no such rule of law.

The case at bar presents the naked question of whether, within the framework of maritime law, a maritime worker whose sole connection with a vessel not owned or operated by his employer is to load or unload cargo from that vessel, can be found to be a seaman and member of the crew of such vessel. The facts are clear and undisputed in this case, and not susceptible of drawing of conflicting inferences. If petitioner's activities in longshoring cargo between the barge and the drilling platform are sufficient to constitute an "evidentiary basis" to support a jury finding that he was a member of the crew of the Foss barge, then he ought to be held a seaman as a matter of law—rather than leave it to the vagaries of a jury's conception of who is a seaman. But it was the will of Congress when it enacted the Longshoremen's Act in

1927 that longshoremen (those who load and unload cargo from ships) and similar maritime workers have a certain compensation remedy, but none other, against their employers.

Obviously, then, a line must be drawn between crew members, on the one hand and longshoremen and other similar harborworkers on the other. This Court recognized and maintained the distinction when it decided *Swanson v. Marra Bros.*, 328 U.S. 1, 90 L.Ed. 1045 (1946), when it held that a longshoreman was precluded from suing his employer under the Jones Act for injuries sustained while engaged in loading cargo on a vessel. If respondent had hired longshoremen from the Longshoremen's Union hiring hall in Anchorage to unload the construction materials from the Foss barge to the drilling platform, and one of them had been injured as was petitioner and had sued respondent under the Jones Act, then the issue would be precisely the same as was decided in *Swanson, Kyles v. James W. Elwell & Co.*, 296 F.2d 703, 704 (7 Cir. 1961) Cert. denied, 369 U.S. 852, 8 L.Ed.2d 10 (1962), *Garland v. Alaska SS Co.*, 217 F. Supp. 757 (D. Ct. Alaska, 1963), *Aycock v. Lykes Bros. SS Co.*, 236 F. Supp. 360, 361 (D. Ct. Tex., 1964), and the other decisions discussed at length in the opinion below: All of these cases held as a matter of law that a longshoreman's sole remedy against his employer is that given him by the Longshoremen's Act—and we are aware of no judicial precedent to the contrary. Just because respondent chose to use construction workers, members of the Ironworkers Union, to perform this task of unloading construction materials from the barge to the drilling platform, can their legal rights be different? There is no reasonable basis in

law or logic for holding that an ironworker doing a longshoreman's work has a remedy the longshoreman does not have.

CONCLUSION

Petitioner belatedly attempts to associate his claimed seaman's status with the drilling platform by contending that it was a "special purpose" vessel on which he could be found to be a seaman. To support this remarkable contention petitioner mis-advises this court that in *Offshore Co. v. Robison*, 266 F.2d 769 (5 Cir. 1959) "the vessel was a non-motive drilling platform, similar to the platform in the instant case, firmly affixed to the bottom of the sea at the time of the injury" (Petition p. 9)—when the very essence of the *Robison* decision was that Offshore No. 55 was not a "man-made island" (which was the court's characterization of a permanently fixed drilling platform such as involved in the case at bar), but was a floating drilling platform carrying life rafts, holding regular abandon-ship drills and moving about from location to location. As a matter of law Middle Ground Shoals drilling platform was no vessel, and petitioner should not now be heard to contend that it was since he did not properly raise this claim in the courts below.

We cannot improve upon the conclusion of the Alaska Supreme Court in its opinion (Petition, Appendix A, p. xvi):

> "The *Butler*, *Grimes*, *Senko*, and *Gianfala* decisions are distinguishable in that the injured employees had performed, or were expected to perform, navigational functions in relation to the vessels (special purpose or otherwise) in question. Here appellant [petitioner] had not performed, and it was

not anticipated that he would perform, any navigational function in regard to this unmanned barge owned by Foss tug. Appellant was a maritime worker whose only duties in connection with this barge were those of a longshoreman. Under the *Swanson* line of decisions we affirm the summary judgment which was entered by the Superior Court."

In *Senko*, this Court stated that it "does not normally sit to reexamine a finding of the type that was made below," but did so because it believed that its decision in *South Chicago Coal and Dock Co. v. Bassett*, 309 U.S. 521, 85 L.Ed. 732 (1940) had not been fully understood. The Alaska Supreme Court did not misunderstand the prior decisions of this Court, and far from having decided the case at bar in a way probably not in accord with applicable decisions of this Court (Rule 19, U.S. Supreme Court Rules) it properly applied this Court's law on this Federal question. The petition for certiorari should be denied.

Respectfully submitted,

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